

Office of the Secretary of Labor

§ 18.803

(c) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

HEARSAY

§ 18.801 Definitions.

(a) *Statement.* A *statement* is (1) an oral or written assertion, or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A *declarant* is a person who makes a statement.

(c) *Hearsay.* *Hearsay* is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the hearing and is subject to cross-examination concerning the statement, and the statement is—

(i) Inconsistent with the declarant's testimony, or

(ii) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(iii) One of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is—

(i) The party's own statement in either an individual or a representative capacity, or

(ii) A statement of which the party has manifested an adoption or belief in its truth, or

(iii) A statement by a person authorized by the party to make a statement concerning the subject, or

(iv) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(v) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

§ 18.802 Hearsay rule.

Hearsay is not admissible except as provided by these rules, or by rules or

regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.

§ 18.803 Hearsay exceptions; availability of declarant immaterial.

(a) The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the